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No. 71-1083

In the Supreme Court of the United States

OCTOBER TERM, 1971

BERNARD W. COBLENTZ, PETITIONER—

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 453 F. 2d 503. The memorandum and order of the district court for the Eastern District of New York (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction was entered on January 10, 1972

(Pet. App. C), and the petition for rehearing was denied on January 24, 1972 (Pet. App. D). The petition for a writ of certiorari was filed on February 23, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sufficiently supported petitioner's conviction for willfully attempting to evade taxes by failing to report income.

2. Whether the district court correctly denied petitioner's motion for a directed judgment of acquittal.

STATUTE INVOLVED

26 U.S.C. 7201 is set forth at Pet. 3.

STATEMENT

Petitioner was convicted after a jury trial of willfully evading his taxes for the year 1965 in violation of Section 7201 of the Internal Revenue Code of 1954. He was found not guilty on counts charging similar offenses for 1963 and 1964. Thereafter, Judge John F. Dooling, Jr., in a memorandum and order dated May 6, 1971, denied petitioner's motion to set aside the guilty verdict and for judgment of acquittal, or, in the alternative, for a new trial (Pet. A7-11). Subsequently, on July 30, 1971, petitioner was sentenced to a one-year prison term, with eleven months

suspended, plus a $5,000 fine (R. 3).[1] Petitioner was released on his own recognizance pending appeal (R. 2, 3).

The evidence showed that the petitioner was an attorney who specialized in condemnation cases and received his legal fees in such cases by separate checks issued directly to him by the City of New York (R. 525-526).

In compliance with the Rules of the Supreme Court of the State of New York, Appellate Division, First and Second Departments, petitioner filed, within 15 days of the award of each claim which he handled (R. 679-680), a "Closing Statement" which contained, among other things, the amount of the award and the portion retained by the attorney as his fee (Pet. A2-3).

The jury was instructed (R. 843-844):

> that checks covering payment for services rendered become gross income in the year in which they are received, if they are checks of a solvent drawer, have been unconditionally delivered, and can be cashed or collected by the recipient at any time he chooses.

The jury was further instructed that the government must prove that petitioner knew that his method of reporting such checks in the year he negotiated them, rather than when he received them, was not correct, and that his return was fraudulent (Pet. A5; R. 837-838, 844). That petitioner substantially and con-

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[1] "R." references are to the appendix filed in the court of appeals.

sistently understated his income over a four-year period is shown by the following tabulation which compares the "Closing Statements" (Exs. 39-42, R. 25-28) with the income tax returns (Ex. 1-4, R. 26-27):

Year	Fees Per "Closing Statements" (Exhibits 39-42)	Reported Gross Receipts (Exihbts 1-4)	Difference
1962	$ 33,756.92	$23,000.00	$10,756.92
1963	25,188.08	22,600.00	2,588.08
1964	58,388.39	21,300.00	37,088.39
1965	47,751.93	22,380.00	25,371.93
	$165,085.32	$89,280.00	$75,805.32

As noted by the court of appeals (Pet. A4), petitioner reported a total taxable income of $30,351.09 for the years 1963 to 1965 when his true total taxable income was $109,017.42; this resulted in an understatement of tax liability in the amount of $40,512.03 for those years.

As noted by the courts below (Pet. A5, A8), the petitioner kept no books and records (R. 320, 338, 382) other than copies of closing statements required by the Judicial Conference. The latter were not complete (R. 41, 123) and did not show when the respective fee checks were deposited by petitioner (Pet. A9). Petitioner deposited some of his fee checks in the year of receipt and others at intervals of one to four years after receipt (Pet. A2; R. 692). In 1966, petitioner cashed fee checks totalling $42,849.32 and placed the cash in a safe deposit box (R. 688-689). In 1967, he failed to report $8,318 in fee checks

cashed in 1967 but received in 1963 (Pet. A6; R. 356, 375-376). Petitioner's tax returns were prepared by accountants from figures read to them by petitioner, although, as noted by the district court (Pet. A9), petitioner did not compile or maintain any summaries of his annual fees and expenses. The tax returns (Exs. 1, 2, 3, 4, 44) show that petitioner furnished his accountants rounded-off totals of gross receipts, and petitioner testified that he estimated his interest income as well as some of his business expenses (Pet. A5; R. 653-655, 661). As noted by the district court (Pet. A7), when a new accountant whom he employed in 1965 inquired about 1964, petitioner falsely stated that he had himself prepared the 1964 return (Pet. A7; Tr. 51, 66).

Petitioner, though married, procured lower tax rates by falsely filing as an "unmarried head of household" and listed a residence address other than where he lived with his wife, who filed separate tax returns (Pet. A4, A7; R. 704-705).

Petitioner testified that his reporting methods were based on advice from an accountant whose name he did not recall (R. 594-595, 724). He also testified that an unidentified Internal Revenue Service official had once approved his method of reporting checks when they were negotiated (R. 595-596) but admitted that in a subsequent year the Internal Revenue Service had required him to pay an additional tax of $1,900 on some "theory of accounting" (Pet. A6; R. 784-785).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 7-11) that the evidence was not sufficient to prove "criminality" or fraud. The courts below correctly held (Pet. A3, A8), and petitioner concedes (Pet. 10), that, as the jury was instructed, the checks which he received were taxable income in the year of receipt.[2] The jury was instructed and warned in some twelve portions of the charge that petitioner could not be found guilty unless he knew of the taxable nature of the omitted fee checks and intended to evade taxes which he believed to be due (R. 831, 833, 834, 835, 836, 837, 838, 839, 840, 844, 845, 846). As noted by the court of appeals (Pet. A6), the evidence previously summarized (Statement, *supra*) justified the jury in disbelieving petitioner's contention that he made only a good faith error.

2. Petitioner's contention (Pet. 11-14) that the trial judge applied an improper standard in determining that the evidence warranted submission of the case to the jury is without merit. The district court, at the conclusion of the government's case, denied petitioner's motion for an acquittal on the following grounds (R. 200):

> But I do think that on this evidence the Jury could infer beyond a reasonable doubt that these

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[2] Collectible checks are clearly income when received. *Lavery* v. *Commissioner*, 158 F. 2d 859 (C.A. 7); *Hedrick* v. *Commissioner*, 154 F. 2d 90 (C.A. 2); *Kahler* v. *Commissioner*, 18 T.C. 31.

> were conscious acts and that the defendant was not filing full and correct returns, but was consciously embarked on a scheme of tax minimization, let us call it, which he knew was not warranted by law.[3]

The court of appeals affirmed on the ground that a motion to acquit is properly denied if there is "substantial evidence" to support a finding of guilt (Pet. A6). "Substantial evidence," of course, constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229. When, in a criminal case, the requirement is added that the jury must reach its conclusions beyond a reasonable doubt, it is plain that the phrase "substantial evidence" as used by the Second Circuit comprehends a standard which is, in essence and application, no different from that employed in other circuits.[4] Furthermore, the "substantial evidence" standard continues to be the enunciated standard of this Court in reviewing evidence of guilt. *Glasser* v. *United States*, 315 U.S. 60, 80.

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[3] This language is not meaningfully different from and no more adverse to petitioner than that of the Fifth Circuit quoted by petitioner (Pet. 12): whether "taking the view most favorable to the Government, a reasonably-minded juror might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt."

[4] See, for example, the cases cited by petitioner at Pet. 12.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted.

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